March 1996

HONOR ROLL

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441st Session, Basic Law Enforcement Academy - November 2, 1995 - January 31, 1996

President:	Deputy Russell S. Osterhout - Thurston County Sheriff's Department
Best Overall:	Deputy Dennis K. Taylor - Snohomish County Sheriff's Department
Best Academic:	Deputy Dennis K. Taylor - Snohomish County Sheriff's Department
Best Firearms:	Deputy Dennis K. Taylor - Snohomish County Sheriff's Department

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Corrections Officer Academy - Class 223 - January 8 through February 2, 1996

Highest Overall:	Officer John J. Farris, II - King County Dept of Adult Detention
Highest Academic:	Officer David L. Harding - King County Dept of Adult Detention
Highest Practical Test:	Officer Kay Lynn Golden - Airway Heights Correctional Center
	Officer Philip K. Chu - King County Dept of Adult Detention
Highest in Mock Scenes:	Officer Michael Askew - McNeil Island Correctional Center
	Officer Carolyn F. Johnson - Airway Heights Correctional Center
Highest Defensive Tactics:	Officer Randy L. Bolinger - Airway Heights Correctional Center
	Officer Kay Lynn Golden - Airway Heights Correctional Center
	Officer Jon Hines - King County Dept of Adult Detention
	Officer Troy L. Klesick - Special Offender Center

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Corrections Officer Academy - Class 224 - January 8 through February 2, 1996

Highest Overall:	Officer Gabriel B. Shank - King County Cept of Adult Detention
Highest Academic:	Officer Lance R. Semenza - Airway Heights Correctional Center
Highest Practical Test:	Officer Gabriel B. Shank - King County Dept of Adult Detention
Highest in Mock Scenes:	Officer Carol L. Rongen - Cowlitz County Jail
	Officer Gabriel B. Shank - King County Dept of Adult Detention
	Officer Alice M. St. Clair - Pierce County Jail
Highest Defensive Tactics:	Officer Rodney O. Prioleau - King County Dept of Adult Detention
	Officer Richard D. Neher - King County Dept of Adult Detention

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WASHINGTON STATE SUPREME COURT

FLASHLIGHT-AIDED LOOK THROUGH LIVING ROOM WINDOW NOT A SEARCH

State v. Rose, 128 Wn.2d ___ (1996)

Facts:

[LED EDITOR'S NOTE: a more detailed factual description of this case can be found in the March '95 LED entry on the Court of Appeals decision in this case.]

A landlord suspected that a tenant was growing marijuana in a mobile home on the landlord's property. On a mid-November evening, the landlord made a call, bringing a police officer to the location at 7 p.m. The officer and the landlord entered the property to investigate. Initially, the landlord and the officer walked to the back of the mobile home to inspect the back of the home and to inspect a storage shed behind the home. [NOTE: this activity was later conceded by the State to have been an unlawful search of the protected curtilage of the home.]

Next, the officer walked around to the front of the home and stepped onto the front porch. At that point, he shined his flashlight through an uncurtained window, just to the left of the door, into the living room area of the mobile home. He saw cut marijuana and a scale lying on a table inside. Based on the latter observation, as well as the other observations and information, the police applied for and obtained a search warrant. Their subsequent search yielded a complete grow operation and fourteen pounds of marijuana.

Rose was charged with possession of marijuana with intent to manufacture or deliver. However, the trial court judge granted defendant's pretrial motion to suppress. The Court of Appeals affirmed, holding that the officer had illegally searched the mobile home when he shined his flashlight through the living room window. See March '95 LED at page 7.

ISSUES AND RULINGS: (1) Was the use of a flashlight to aid in looking into a mobile home's living room a "search" restricted under the Fourth Amendment of the U.S. Constitution? (ANSWER: No, rules a 5-4 majority); (2) Was this use of the flashlight a "search" restricted under an independent grounds reading of article 1, section 7 of the Washington Constitution? (ANSWER: No, rules a 5-4 majority); (3) Did the officer's initial unlawful intrusion into the area behind the mobile home and near the storage shed impermissibly taint the entire matter, such that his later observations from the mobile home's front porch must be excluded? (ANSWER: No, rules a 5-4 majority) Result: Court of Appeals' order affirming Snohomish County Superior Court suppression order reversed; case remanded for trial.

(1) Flashlight Use Not A Fourth Amendment Search

The majority opinion explains as follows the Court's rejection of defendant's Fourth Amendment theory that use of a flashlight in this context is a "search":

> [N]o search within the meaning of the Fourth Amendment occurs where the "open view" doctrine is satisfied. Under the "open view" doctrine: "'As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" . . ..'" Where the open view doctrine is satisfied "'[t]he object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.'"
>
> There can be no serious question that Officer Dekofski was entitled to walk up onto the porch. "It is clear that police with legitimate business may enter areas of the

curtilage which are impliedly open, such as access routes to the house."

Defendant Rose's mobile home was at the end of a private driveway off a private road, but there was no "private" sign posted, and the property was not fenced. Nothing in the record indicates that any attempt was made to prevent people from approaching the residence. The front porch was accessible from a large parking area near the mobile home. The porch was impliedly open to the public.

Just as the officer could lawfully step onto the front porch, he also could intentionally look through the window. There is no inadvertence requirement under the open view doctrine. The conduct of an officer at residential premises does not exceed the open view doctrine just because the officer is there deliberately to look for evidence of a crime.

Nor is there any constitutional infirmity resulting because Officer Dekofski looked through a window to the left of the door. First, there is no reasonable expectation of privacy in what can be seen through uncurtained windows.

The window through which Officer Dekofski looked is a waist high picture window just left of the front door. Standing on the porch, one can look directly through the window without leaning, bending, or straining the body -- and indeed, there is no evidence in this case that the officer had to leave the porch or maneuver his body in any way to see through the window.

An officer may act as any reasonably respectful citizen. Such a person can be expected to stand virtually anywhere on a porch like the one in this case while waiting for a response from the door, and to look inside while waiting. A resident who leaves unobstructed a window immediately to the left of the front entrance should expect that reasonably respectful persons will look in, even if just out of curiosity.

. . . The only serious question in this case is whether it makes any difference that darkness fell before he could complete that investigation.

The use of a flashlight has been upheld under the open view theory in a number of contexts. . . .

Recently, the United States Supreme Court held that no unlawful search occurred when officers in an "open field" used a flashlight to look through an open door into a barn which the Court assumed was entitled to Fourth Amendment protection. The Court said use of the beam of the flashlight did not turn the officers' observations into an unreasonable search, ...

. . . [W]e have examined the lawfulness of the vantage point without reference to use of a flashlight and have concluded that Officer Dekofski was in a lawful vantage point. Next, we examine the intrusiveness of the view, including the use of the flashlight. . . . [W]e hold that the fact that a flashlight is used does not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness falls. One who leaves contraband in plain sight, visible through an unobstructed window to anyone

> standing on the front porch of his residence, does not have a reasonable expectation of privacy in the visible area.
>
> Nor is the mere use of a flashlight an intrusive method of viewing. A flashlight is an exceedingly common device; few homes or boats are without one. It is not a unique, invasive device used by police officers to invade the privacy of citizens, and is far different from the device at issue in State v. Young, 123 Wn.2d 173 (1994) **[April '94 LED:02]**. In Young, we held that use of an infrared device to detect heat patterns in the home, which could not be detected by the naked eye or other senses, and which could in effect enable the officer to "see through the walls" of the home, was a particularly intrusive method of viewing which went well beyond mere enhancement of normal senses. A flashlight, in contrast, does not enable an officer to see within the walls or through drawn drapes. Instead, it is a device commonly used by people in this state, and, in fact, would be an expected device for someone to use approaching a mobile home in a rural area at dusk or after nightfall.
>
> Officer Dekofski looked through an unobstructed window to the left of the front door while lawfully standing on the front porch. Rose simply did not have an expectation of privacy in what could be seen through that window in natural light, and the fortuity that darkness fell before Officer Dekofski could investigate the report of criminal activity does not change that fact. There was no Fourth Amendment violation as a result of the officer's observations through the unobstructed window while using a flashlight.

[Text, footnotes, some citations omitted]

(2) Flashlight Use Not A State Constitutional Search

Turning to defendant's "independent grounds" argument, the majority finds no basis for establishing greater restrictions on law enforcement use of flashlights under the state constitution (article 1, section 7) than under the Fourth Amendment.

(3) Tainted Evidence?

Rejecting Rose's argument that the officer's initial unlawful invasions of the area behind the mobile home tainted his later "open view" observations, the majority opinion explains:

> The State has conceded the activity at the rear of the mobile home and the shed was illegal. Information obtained during that illegal search must be stricken from the affidavit in support of the warrant, and cannot be used to determine probable cause to issue the arrant. However, Officer Dekofski legitimately responded to the landlord's report of a possible marijuana grow operation. In responding to that report, he was entitled to approach the front of the mobile home, access the residence by the impliedly open way between the parking area and the mobile home, and step up onto the front porch to conduct his investigation. Any information gathered at the rear of the home did not alter the fact that Officer Dekofski already had the information leading him to a legitimate investigation at the front of the mobile home. Under these circumstances, the officer's deviation to the

> area back of the home is immaterial in assessing the validity of his view from the porch of the mobile home. The illegal search did not taint the open view from the front porch, and did not turn what otherwise is a lawful vantage point into an unlawful one.

[Citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **TRUCK CAB'S SLEEPING AREA WITHIN STROUD "SEARCH INCIDENT" SCOPE** -- In State v. Johnson, 128 Wn.2d ___(1996) the Washington State Supreme Court has affirmed a Court of Appeals' decision (see case at 77 Wn. App. 441 (Div. II, 1995) **Aug. '95 LED: 12**), holding that, immediately following a lawful custodial arrest of a truck driver, a WSP trooper acted lawfully under the case law governing "search incident to arrest," when the trooper searched the interior of the truck cab, including a sleeping compartment located immediately behind the driver's seat.

First analyzing the Washington State Constitution's article 1, section 7 privacy protection provision, the Court finds to be controlling the case of State v. Stroud, 106 Wn.2d 144 (1986)**[Aug. '86 LED:01].** In Stroud, the Court in Johnson notes, the Court announced the following "bright line" rule for the permissible scope of a warrantless search of an automobile incident to an arrest:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container [as a part of the search incident to arrest].

Johnson's truck cab sleeping compartment was accessible through a "rubber boot" connecting the driver area and the sleeping area. The two areas were separated only by a curtain. The Court declines to distinguish such an area from the passenger area of a car or pickup truck, and therefore the Court rejects Johnson's "independent grounds" argument under Stroud and the Washington constitution.

Turning next to the Fourth Amendment standard for search incident to arrest, the Court finds no support for Johnson's argument there, either. The leading Federal case is New York v. Belton, 453 U.S. 454 (1981); **Sept. '81 LED:03**.

The Johnson Court notes that federal court cases decided under Belton have interpreted its "bright line" rule as allowing a "search incident" of any container and any area that, at the time of the stop, could have been reached by the driver or a passenger without exiting the vehicle. This scope of search is allowed without regard to whether there are actually occupants other than the driver in the vehicle, and thus "without regard to the likelihood in the particular case that such a reaching was possible." Cases decided under Belton have allowed searches of unenclosed hatch areas of hatch backs and the rear sections of station-wagons. On the other hand, the federal

cases preclude officers from searching the separate, closed trailers on tractor-trailer combinations. The Johnson Court holds that the "search" incident before it falls within the former group of cases, i.e., the cases permitting searches into reachable areas.

The Court also rejects Johnson's claim that his truck sleeping compartment was his "home" for Fourth Amendment purposes, and that it could not be searched without a warrant, consent, or exigent circumstances. Here, the Court's rationale is that: (1) Federal cases have allowed searches of train sleeping compartments incident to arrest, and (2) the two types of sleeping compartments -- train and truck sleepers -- are closely analogous.

Seven justices join in the majority opinion in Johnson. Justice Johnson writes a concurring opinion joined by Justice Alexander in which they agree with the result under the facts of this case, but they express concern that the majority opinion suggests that police have authority under Stroud to search a vehicle's "living quarters that are separate and distinct from the portion of the vehicle where the driver and passengers would ordinarily be located." In other words, the concurrence worries that the majority opinion would support a thorough search of all areas of a motor home incident to arrest.

Result: Yakima County Superior Court conviction for possession of a controlled substance affirmed.

LED EDITOR'S COMMENTS: Our comments address two "search incident" sub-issues about which questions may arise following the Johnson decision: (1) Does the Stroud rule governing motor vehicle searches incident to arrest apply to litter bags found in vehicle passenger areas? and (2) Does the Stroud rule permit a search of all areas in a motor home following an arrest of an occupant of the motor home?

(1) LITTER BAG SEARCH AS PART OF A "SEARCH INCIDENT"

Defendant Johnson asserted that the leather pouch which was the repository of the illegal drugs found in his truck sleeper was a garbage container. He then argued that the garbage container was protected because it was analogous to the garbage-can-left-at-curbside which the State Supreme Court held to be protected from warrantless search in State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02. The majority opinion was not as direct in disposing of this ridiculous argument as we would have liked.

The obvious answer to the absurd Boland analogy is that Boland's protection of garbage cans does not in any way limit searches of any unlocked containers -- garbage containers or other types of containers -- found within an area which is subject to a thorough search under a "bright line" search warrant exception. Thus, an unlocked container, whether for garbage or otherwise, is not protected from a search: (1) incident to the arrest of a person standing at curbside next to the container at the point of arrest *[The "bright line" rule in the non-vehicle situation is that the person and everything within the "lunge area" may be searched incident to the arrest.]****; or (2) pursuant to lawful, unrestricted consent to search an area in which the garbage can is found*** *[The "bright line" rule here is that an unlimited consent to search an area includes authority to search all unlocked containers in that area.].*

As noted above, the majority opinion in Johnson is not as clear in rejecting the Boland-based garbage-container argument as we would have liked. Instead, the majority opinion focuses more attention on the question of whether the bag was in fact a "litter bag". This

focus unfortunately implies that some credence could be given to a future defendant's absurd Boland-based argument. Nonetheless, we think that there is sufficient language in Johnson on this issue that the prosecutor can argue that Johnson rejected the garbage-container-privacy theory in the MV search incident context. Finally on this question, our hope is that the theory will fail on its own obvious absurdity.

(2) MOTOR HOME SEARCHES UNDER STROUD

Much more difficult to answer is the question of how the State Supreme Court will resolve the question of the permissible scope of a search incident to the arrest of a motor home occupant. Because a hypothetical motor home occupant could theoretically reach any area within the motor home, including the bathroom and other living areas, Johnson's description of the Fourth Amendment rule would appear to allow for a search of all such areas, without regard to whether there were any occupants of the vehicle who could actually have made such a reaching at any time during the arrest process.

However, we have our doubts. Motor homes are part vehicle and part home. Even as to the Fourth Amendment, the Johnson majority opinion does not state that the entire interior of a motor home is within the permissible scope of a search incident to arrest of an occupant. Instead, the Johnson Court notes accurately that the Fourth Amendment case law is unclear where motor homes are concerned. Then, in the state constitutional analysis in Johnson, the majority does not give clear signals as to how motor homes fit in. Accordingly, we urge caution where motor homes are concerned. Officers will want to consider whether there are other possible justifications for search -- getting consent, getting a warrant based on probable cause to search, asserting exigent circumstances -- and then consider all the surrounding circumstances before choosing to tread into this gray area of "search incident" authority.

(2) **SINGLE ACT OF HARASSMENT SUPPORTS CONVICTION UNDER RCW 9A.46.020 --** In State v. Alvarez, 128 Wn.2d 1 (1995), the State Supreme Court rejects defendant's argument and holds that, despite the introductory section of the criminal harassment statute, RCW 9A.46.010, which speaks of legislative intent to address repeated acts or threats or a pattern of harassment, a person can be convicted of harassment for a singular threat. Accordingly, the Court holds that a single threat can constitute harassment if the evidence satisfies the other elements of the statute (based on the nature of the act threatened and the reasonableness of the victim's fear).

Alvarez was adjudicated guilty of two counts of harassment involving: (1) a threat to a neighbor woman who spoke to him while watching him kill a pigeon ("Shut up bitch or I'll take you out too") . . .; and (2) an outburst of threats to a teacher who had angered him (threatening during a single tirade to poison the teacher, to bomb his home and to burn it). In each case, the act of threatening, though a singular event, was sufficient to support the charge of harassment, the Court holds.

Result: King County Superior Curt (juvenile division) adjudication of one count of harassment affirmed. [NOTE: final disposition of the other count of harassment was delayed for reasons not pertinent to the issue discussed above.]

(3) **TRIAL COURT DECISION TO CLOSE PRETRIAL SUPPRESSION HEARING MUST MEET SPECIFIC STANDARDS --** In State v. Bone-Club, 128 Wn.2d 254 (1995), the State Supreme

Court reverses a Court of Appeals' decision (see 76 Wn. App. 872 (Div. I, 1995) **Aug. '95 LED:22**) and sends a VUCSA case back to the trial court for further proceedings and a new trial. The error requiring reversal was the trial court's decision to close a pre-trial suppression hearing to protect the identity of an undercover narcotics officer.

The Supreme Court explains at the outset of its analysis that the right to a public trial extends to a pretrial suppression hearing, and that the failure of defendant Bone-Club to object to closure was not a waiver of his right. The Court then explains further that a strict, well-defined standard has been adopted by the courts to determine whether a hearing can be lawfully closed in opposition to a defendant's right to public trial (and the public's related right of access to court proceedings) as protected under the Washington constitution.

Thus, the following five guidelines must be met before a hearing can be closed -- (1) there must be an imminent threat to a compelling government interest; (2) interested persons must have an opportunity to object; (3) the closure order must be drawn as narrowly as possible; (4) competing interests for closure and openness must be weighed; and (5) the duration of closure must be no longer than needed. In the Bone-Club case, the Supreme Court notes, the trial court did not engage in the kind of detailed review required to protect the defendant's right to public trial.

As for the justification offered by the Court of Appeals (see Aug. '95 LED at 22), the Supreme Courts asserts that the Court of Appeals' conclusory, blanket declaration that a public hearing would threaten "any" undercover officer cannot be characterized as a finding of a compelling interest. Instead, the Supreme Court asserts, "only evidence of a particularized threat would likely justify encroachment into a defendant's constitutionally guaranteed fair trial rights." Moreover, even if the compelling interest of a particularized threat were found by the trial court, the other four criteria (set forth above) would also have to be met.

Finally, the Supreme Court concludes by asserting that prejudice will be presumed whenever a violation of the right to public trial occurs. Accordingly, the case is remanded for a new trial.

Result: reversal of Court of Appeals' decision and of Whatcom County Superior Court convictions for: (A) possession of a controlled substance (two counts), and (B) distribution of a controlled substance (four counts); case remanded to Superior Court for further proceedings, which may include a hearing on whether any suppression hearing may be closed.

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WASHINGTON STATE COURT OF APPEALS

MAN-WITH-A-GUN STOP LAWFUL BECAUSE ALARM FOR SAFETY OF OTHERS WARRANTED PER RCW 9.41.270; FELONY STOP PROCEDURES NOT AN "ARREST"

State v. Mitchell, __ Wn. App. __, 906 P.2d 1013 (Div. I, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals' opinion)

> While on night patrol in a police vehicle, an officer observed Christopher Mitchell and a companion walking down a street in a residential area in Seattle. Mitchell was carrying a semi-automatic handgun. As the officer passed Mitchell, he

observed Mitchell tuck the handgun into his waistband. The officer reported his observation on the radio, turned his patrol car around, and approached Mitchell and his companion on an adjacent street. The officer stopped his car behind the two, with flashers and spotlight on. The two were walking away from, and had their backs to, the officer. The officer drew his gun and ordered the two to stop and put their hands up. Mitchell tossed his handgun into some bushes while raising his hands. The officer then ordered the two to lie face down, with legs spread and arms at sides. The two remained in that position for two to three minutes until other officers arrived.

After discovering Mitchell's identity and criminal record, the officer arrested Mitchell for being an adjudicated minor in possession of a handgun. Mitchell was subsequently charged with unlawful possession of a firearm having previously been convicted of a crime of violence, in violation of former RCW 9.41.040. The trial court denied Mitchell's motion to suppress the handgun, and found Mitchell guilty on stipulated facts.

ISSUES AND RULINGS: (1) Did the officer's intrusion during the seizure constitute an "arrest" requiring probable cause to support it? (ANSWER: No) (2) Did the officer have "reasonable suspicion" justifying his Terry stop of Mitchell? (ANSWER: Yes) Result: King County Superior Court conviction for possession of firearm affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

(1) No Arrest

A police officer may temporarily detain a person based on a reasonable suspicion that the person is or has been involved in criminal activity. The officer's reasonable suspicion must be based on objective facts. The detention must not exceed the duration and intensity necessary to confirm or dispel the officer's suspicions. If the stop exceeds these limitations, it can be justified only by a showing of probable cause.

The intrusion upon Mitchell's liberty was greater than the typical Terry stop, which normally includes a frisk for weapons and brief questioning. However, under certain circumstances measures such as handcuffing, secluding, and drawing guns on the suspect may be appropriate to accomplish a Terry stop. Such circumstance only exists when the police have a reasonable fear of danger. For example, it is reasonable for an officer to draw a weapon to effect a stop where a suspect is believed to be armed. In addition, an emergency situation may warrant temporary restraint of a suspect without investigation.

We hold that the scope of this stop was within the bounds of a reasonable investigatory detention under the circumstances. [T]he officer in this case had legitimate concern for his safety and the safety of others because Mitchell was carrying a gun. In addition, the officer was justified in restraining Mitchell for a time without investigating his suspicions about criminal activity because the officer was alone and Mitchell had at least one companion who also may have been armed. Reasonable concern for the officer's own safety warrants the officer waiting for backup before approaching the suspects.

Mitchell argues that the intrusiveness of the stop amounted to an arrest. Contrary to Mitchell's contention, the intrusiveness of the stop is not the sole measure for determining whether a stop is an arrest or a Terry stop. The permissible scope of an investigatory stop is determined by all the circumstances facing the officer at the time of the stop.

Mitchell was ordered to stop, raise his hands, and then lie down face first on the ground. Mitchell remained in that position for at least two or three minutes. Mitchell may not have known that the officer had his gun drawn, because the officer approached from behind. Nevertheless, Mitchell obeyed the command to lie down on the sidewalk. This was a grave intrusion upon his liberty. However, it is difficult to imagine a less intrusive means of effecting a stop of an armed suspect with a companion which would not compromise the officer's safety. The officer was clearly justified in trying to avoid an exchange of gun fire.

(2) Reasonable Suspicion

Mitchell also argues that the stop was not justified because the officer could not articulate a reasonable suspicion, based on objective facts, that Mitchell was engaged in criminal activity. We hold first that the facts of this case support a reasonable suspicion of criminal activity. We also hold that the existence of such reasonable suspicion is determined based on a objective view of the known facts, and is not dependent upon the officer's subjective belief or upon the officer's ability to correctly articulate his or her suspicion in reference to a particular crime.

Under RCW 9.41.270 it is illegal to carry and display a weapon "in a manner, under circumstances . . . and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." (Emphasis added.) Mitchell was openly carrying a semi-automatic weapon while walking down a street in an urban, residential area at night. When ordered to stop and raise his hands, he tossed his weapon into nearby shrubbery. Openly carrying such a weapon at that time and place was sufficient to warrant reasonable suspicion that this statute was being violated.

The officer did not give unlawful display of a weapon as his reason for effecting the stop. Indeed, the officer testified that he saw nothing that in and of itself would constitute a crime. However, the existence of a reasonable suspicion does not depend on the officer's subjective beliefs, but is determined based on an objective standard. Much like the test for probable cause, the facts within the officer's knowledge must provide a basis for a reasonable suspicion. Although the officer did not name the particular crime for which he could articulate a reasonable suspicion, his suspicion was based on the very factors which constitute unlawful display of a weapon. The officer's stop was lawful.

[Citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **ENGINE COMPARTMENT, LIKE TRUNK AREA, OFF LIMITS UNDER STROUD'S SEARCH INCIDENT RULE** -- In State v. Mitzlaff, __ Wn. App. __, 907 P.2d 328 (Div. II, 1995), the Court of Appeals for Division II rules that the engine compartment of a motor vehicle is similar in nature to the trunk area, and therefore is off-limits under the "bright line" search-incident-to-arrest rule of State v. Stroud, 106 Wn.2d 144 (1986) **Aug. '86 LED:01**.

Following officers' stop and eventual arrest of Jerry Mitzlaff for DUI, officers searched his pickup truck cab and found illegal drugs, drug paraphernalia, and duct tape. The officers then pulled the interior hood latch release and looked under the hood, finding, duct-taped to the fire wall, four plastic bags containing a total of approximately 3/4 of a pound of methamphetamine. Prior to Mitzlaff's trial for possession of the methamphetamine with intent to deliver, he successfully moved to suppress that portion of the evidence which had been seized from under the hood. The State appealed the trial court's suppression ruling to the Court of Appeals.

The Court of Appeals begins its "search incident" analysis by quoting from the Stroud decision's "independent grounds" ruling under the Washington State constitution, article 1, section 7:

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, *officers should be allowed to search the passenger compartment of a vehicle* for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

The Court of Appeals continues with its own analysis as follows:

> Division Three of this court addressed the scope of the "passenger compartment" in State v. Johnson, 77 Wn. App. 441 (1995) **[Aug. '95 LED:12]**. The Johnson court held that the passenger compartment included the sleeping area of a truck cab located directly behind the driver's seat and reachable without exiting the cab. In so ruling, the Johnson court cited with approval the rule Professor LaFave advocates, that a passenger compartment should be construed "as including *all* space reachable without exiting the vehicle. . ." [Emphasis by LaFave]
>
> Federal cases are consistent with this rule, holding that the term "passenger compartment" includes the trunk area of a hatchback automobile and the rear section of a station wagon. [Case citations omitted by LED Ed.]
>
> An engine compartment, however, is not accessible without exiting the vehicle. As with the trunk of a car, the engine compartment is not an area within the arrestee's immediate control from which the individual might obtain a weapon or destroy evidence. Accordingly, the permissible search of the passenger compartment incident to arrest does not extend to include the engine compartment.
>
> The State argues that the increased presence of interior hood releases renders the engine compartment more accessible from a vehicle's interior than when Stroud was decided. It further argues that an officer has no way of knowing if an individual stashed something under the hood moments before the officer

> approached. These arguments are unpersuasive. Many modern cars also contain interior trunk releases. Federal courts, however, repeatedly have held that trunks are outside the scope of the search incident to arrest exception. [Federal case citations omitted by LED Ed.] Because article 1, section 7 is more restrictive than the Fourth Amendment, we have no hesitancy in extending this rationale to preclude search of the engine compartment.

[Some citations omitted]

(2) **DEFAMATION VERDICT FOR WSP TROOPER UPHELD --** In Richmond v. Thompson, 79 Wn. App. 327 (Div. I, 1995), the Court of Appeals rejects Dr. Woodrow Thompson's several theories on appeal, and the Court upholds a jury verdict for defamation in favor of a WSP trooper against Dr. Thompson.

The facts and trial court proceedings in Richmond are described by the Court of Appeals as follows:

> Trooper Richmond stopped the Thompsons for speeding on Highway 2 near Leavenworth. He told Dr. Thompson that the radar indicated he had been traveling at 67 miles per hour (in a 55-mile-per-hour zone). Dr. Thompson insisted that this was impossible because his cruise control was set at 55. When Trooper Richmond persisted in writing a citation, Dr. Thompson became very angry and accused Trooper Richmond of trying to meet a ticket quota. Dr. Thompson eventually signed the ticket and drove away. A short time later, however, he turned around and returned to the area where he had been ticketed.
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> By this time, Trooper Richmond had stopped another car and was in his patrol car writing the driver, Eric Hanson, a ticket. Dr. Thompson parked his car in front of Hanson's vehicle and walked back to talk to Hanson. Hanson said he had been speeding and refused Dr. Thompson's invitation to join in a lawsuit against Trooper Richmond. When Trooper Richmond saw Dr. Thompson talking to Hanson, the trooper returned to the Hanson vehicle.
>
> What happened next is in dispute. Trooper Richmond, Hanson, and Hanson's passenger testified that Trooper Richmond forcefully told Dr. Thompson to leave, and that Dr. Thompson left only after being told that he would be arrested for obstructing an officer if he continued to interfere. Dr. Thompson, on the other hand, testified that Trooper Richmond pushed him and threatened to shoot him.
>
> Dr. Thompson did not mention these allegations when he appeared in district court on the infraction. Dr. Thompson said he could not have been speeding because he had set his cruise control at 55. The judge found the infraction had occurred. Dr. Thompson then retained counsel who appealed the infraction to superior court. The case was remanded to district court for a retrial. Both Trooper Richmond and Dr. Thompson testified at the retrial before a different judge. Dr. Thompson again denied speeding but did not claim that Trooper Richmond pushed or threatened him. The court again found that the infraction had occurred.
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> Shortly before the retrial, Dr. Thompson discussed his case with Sharon Tucker at

the Governor's office of Constituent Affairs. Dr. Thompson told Tucker that Trooper Richmond had assaulted him and threatened to blow his head off. Dr. Thompson sent a letter to the Governor's office relating the same allegations and stating that he was pressing charges against Trooper Richmond for assault and attempted murder. Dr. Thompson sent copies of these letters to the Chelan County prosecutor and the district court judge. He later wrote to the prosecutor demanding that Trooper Richmond be prosecuted for assault and attempted murder.

Dr. Thompson's allegations were brought to the attention of the State Patrol, which conducted an internal investigation. After interviewing the several witnesses to the incident, the investigating officers determined that Dr. Thompson's charges were unfounded.

Trooper Richmond then brought this action against Dr. Thompson, alleging, [among other things] defamation, malicious prosecution and outrage. Dr. Thompson counterclaimed, alleging violations of the Thompsons' civil rights and various torts, including assault. The trial court granted Dr. Thompson's motion for summary judgment on Trooper Richmond's outrage and malicious prosecution claims. The court denied a motion to dismiss the defamation claim, rejecting Dr. Thompson's arguments that his complaints were absolutely privileged based upon the constitutional right to petition for redress found in both the federal and state constitutions.

The court's defamation instruction required Trooper Richmond to prove that Dr. Thompson's letter to the Governor's office was false, was defamatory per se, was communicated to a third party, caused damage to Trooper Richmond, and was published with actual malice. Both Dr. Thompson's proposed instruction and the instruction actually given to the jury required Trooper Richmond to prove the first four elements by a preponderance of the evidence and the actual malice element by clear and convincing evidence. Another instruction provided that if the jury found for Trooper Richmond on his defamation claim, the jury should presume that Trooper Richmond suffered damages.

The jury rejected all of Dr. Thompson's cross claims, found in Trooper Richmond's favor on his defamation claim, and awarded him $15,000.

Rejecting Dr. Thompson's several grounds for appeal, the Court of Appeals holds, among other things, that Dr. Thompson's allegations against Trooper Richmond were not privileged under state or federal law.

Result: King County Superior Court verdict for Trooper Richmond affirmed.

(3) **LICENSE REVOCATION AS HABITUAL TRAFFIC OFFENDER CONTINUES AFTER STATUTORY FIVE-YEAR REVOCATION PERIOD ENDS; REINSTATEMENT NOT AUTOMATIC** -- In State v. Danner, 79 Wn. App. 144 (Div. II, 1995), the Court of Appeals rules that the revocation of an habitual traffic offender's (HTO) driver's license continues until such time as the license is expressly reinstated by the Department of Licensing pursuant to RCW 46.65.100, regardless of whether the five-year revocation period of RCW 46.65.070 has expired. A petition

to the Department, as required by RCW 46.65.100, is a prerequisite to such reinstatement, the Court rules.

Accordingly, the Court of Appeals rules that Garrett Lee Danner was guilty of first degree driving while license suspended or revoked: (1) where he had been stopped for speeding five-and-a-half years after his license had been revoked because of his being an HTO, and (2) where he had not in the interim petitioned for reinstatement of his license.

Result: reversal of Grays Harbor Superior Court decision which had affirmed dismissal of charges by Grays Harbor District Court; case remanded for trial.

(4) **GROW OP SEARCH -- STATE WINS ON "PRETEXT", PUD REQUEST ISSUES; BUT STATE LOSES ON PROBABLE CAUSE ISSUE --** In State v. Rakosky, 79 Wn. App. 229 (Div. III, 1995), the Court of Appeals rules in favor of the State: (1) on a "pretext" stop issue (ruling that it was lawful for a law enforcement officer to ask a person for his date of birth while helping him with a car stuck in the snow, even though the officer suspected the person of being involved in a residential marijuana grow operation at the time); and (2) on a PUD inquiry issue (ruling that where an initial written request for public utility records was properly made under RCW 42.17.314, then a second written request to the PUD could be deemed a continuation of the first request, such that, where the second request had inadvertently omitted the necessary explanation about suspicion of criminal activity, the information obtained under the second request was nonetheless admissible).

However, the Court of Appeals then rules by a 2-1 vote that the following facts (set forth in a search warrant affidavit by Sheriff's Deputy Michael Ostlie, as described in the majority opinion of the Court of Appeals) did not establish probable cause to search Rakosky's residence for a grow operation:

> 1. In October 1992 two state game officers approached the residence while conducting an investigation. They reported entering the property through a metal gate just off the highway, and walking uphill on the driveway about 150 yards to a second gate in a fence with electric wires on the top and bottom. As they started to remove the top wire to enter the fenced enclosure, two large guard dogs forced them to retreat. No one emerged from the residence. The officers noticed a large, windowless shed-type building within the enclosure. There were no vehicle tracks into the building, but there was a footpath in the snow between it and the residence. There was a utility meter box midway between the residence and the building. One of the game officers reported his observations to deputy Rick Jamison, a member of the Pend Oreille County Drug Task Force team, and pointed out the property from a vantage point across the Pend Oreille River since the buildings could not be seen from the highway.
>
> 2. Deputy Jamison obtained the property's legal description and the owner's name from the assessor's office, and the owner's address and date of birth from police computers. The criminal history of the listed owner, Jeffrey J. Schwan of Reardan, Washington, showed a guilty plea/deferred prosecution for a 1987 marijuana violation in Seattle, plus use of the alias Arthur Moore. Mr. Schwan's driving record showed a failure to appear for a speeding violation in Spokane.

3. In November 1992 deputy Ostlie obtained electricity consumption records for the property from the public utility district (PUD), which showed there were two separate meters on the property. One served the residence, the other served the outbuilding, which had been built after Mr. Schwan bought the property. In October 1992 Mr. Schwan had placed both accounts in the name of Jim Adams. The records showed monthly consumption rates for the residence were three to four times what they had been before Mr. Schwan acquired the property, and the outbuilding was consuming about the same amount of electricity that the residence had before Mr. Schwan's ownership. Deputy Ostlie learned from the previous owner that the twenty-four foot by thirty-two foot residence had wood stove type fireplaces in the basement and main floor, with small portable electric heaters as a second heat source. Deputy Ostlie stated his own electricity consumption was approximately the same for an all-electric house more than twice the size, in the same approximate area, kept at a constant temperature of 72 degrees with no secondary heat source. The report obtained by Deputy Ostlie covered December 18, 1991 to September 14, 1992. A second report obtained by another deputy in February 1993 covered October 14, 1992 to February 16, 1993.

4. The drug task force directed the sheriff's patrol division to monitor activity at the residence for the next few months. In December Deputy Don Garner "conducted a stop and talk" with the driver of a van stuck in the snow near the driveway gate. The driver identified himself as James Adams, from California, and gave a birth date. Police checks indicated there was no conforming California driver's license. Deputy Garner made further inquiries and determined the van driver had identified himself to others, including the mail carrier, as James Adams.

5. Deputy Garner "conducted a traffic stop on the van" and discovered the driver was "James Adams." When asked for his license, the driver identified himself as Paul James Rakosky and produced a California license. He explained he had used the false name due to some trouble he had had in California. The license and police checks showed his actual name as James Paul Rakosky, and a criminal records check showed a marijuana possession charge in May 1991 in Orange County, California. The owner of the van was Michael Keith Privette of Kirkland, Washington. A criminal records check showed a 1989 marijuana possession charge in Kirkland.

6. During several months of observation, officers noticed snow did not accumulate on the metal roof of the outbuilding despite heavy snowfall and an average accumulation of twenty to thirty inches on other composite and metal roofs in the area. Occupancy of the residence was sporadic, with several days' occupancy followed by up to a week's vacancy. The driveway was kept plowed, and the two guard dogs, both Rottweilers, ran free within the inner fence enclosure.

Deputy Ostlie concluded his affidavit with the following summary:

> Based upon the criminal histories of the three individuals involved with the property, their past and present attempts to provide aliases or variations of names on utility accounts, vehicle registrations and police reports, unusual electrical consumption rates, the placement of gates and fences upon the property absent any livestock, trained guard dogs with free access to all

> structures within the inner perimeter electric fence situated on the property, the absence of continuous occupancy at the residence with abnormally high electrical consumption, the lack of snow accumulation on the roof of the large shed during the winter months, absence of vehicle tracks or equipment entering the large shed, and a van that has no windows (panel) and covered rear windows and [is] used exclusively by individuals at the property, leaves one to believe that there is probable cause to believe that the crime of cultivating marijuana is occurring upon the property of and within the structures of the Schwan residence.

Result: reversal of Pend Oreille Superior court controlled substances conviction for (1) manufacturing and (2) possession with intent to deliver.

LED EDITOR'S COMMENT: The dissenting opinion by Judge Sweeney in Rakosky makes a very good argument that common sense dictates a probable cause determination under the above facts. One hopes that the State's petition for review to the State Supreme Court will be granted, and the Court of Appeals' decision by Judges Schultheis and Thompson will ultimately be reversed.

(5) **OFFICERS' ODOR INFORMATION IN SEARCH WARRANT AFFIDAVIT ESTABLISHES PC FOR "GROW" SEARCH WARRANT** -- In State v. Johnson, 79 Wn. App. 776 (Div. III, 1995), the majority opinion (Judge Schultheis dissenting) for the Court of Appeals for Division III analyzes as follows the question of whether officers' statements claiming that they had been able to smell the odor of growing marijuana from outside a house supported probable cause to search that house for a marijuana grow operation:

> In considering the adequacy of smell observations to support probable cause, we consider the experience and the expertise of the DEA agents. In fact, the agents' particular expertise has been called critical. The agents' sense observations must consist of more than mere personal belief.
>
> The affidavit here amply identifies the specific training and experience of each agent involved in the investigations. It thereby adequately dispels any notion that the representation in the affidavit was merely a personal belief. Special Agent Levy had been involved for over seven years as the Marijuana Eradication Coordinator for the Eastern District of Washington. He had personally investigated or assisted in investigations culminating in the seizure of several thousand cannabis plants. In addition, he had graduated from marijuana aerial spotting school, Indoor Cannabis Investigation School, and had participated in at least thirty search and/or seizure warrants in the preceding year, all involving the manufacture of cannabis by indoor propagation. Agent Levy represented that he was familiar with the characteristic odor associated with growing or freshly harvested marijuana. That representation was neither challenged at the trial court nor in this appeal.
>
> Special Agent Destito had been with the DEA since 1991 and had an additional six years of experience as a police officer. During that time, he attended the Washington State Criminal Justice Center, Basic Law Enforcement Academy, and the United States Department of Justice DEA/FBI Academy. He participated in

and directed police operations targeting both indoor and outdoor marijuana cultivation. He also represented that as the result of this training and experience he knew the distinctive odor associated with the marijuana plant. This representation is likewise unchallenged by Johnson. The sense observations here are based on more than personal belief.

A similar affidavit was upheld in State v. Hansen [42 Wn. App. 755 (Div. III, 1986) **May '86 LED:15**]. There, the affidavit represented that the affiant had been a law officer for twenty-seven years, had graduated from the DEA marijuana eradication school, and had arrested people for possession of marijuana. The court concluded that the smell was based o more than mere personal belief on the part of the affiant. Like Hansen, the affidavit here identifies the length of the career of both individuals, their pertinent education, and past experience in the arrest and investigation of people growing marijuana.

Johnson argues nonetheless that the representations in the affidavit supporting the search warrant are inadequate. He says the agents should have described the particular distinctive characteristic of the odor they identified and further explained why they could not smell marijuana on different parts of the property under investigation. They also should have been required to detail their success rates as to previous warrants and identify their distance away from the home when they smelled the odor. We disagree.

. . . Both agents smelled the odor of growing or freshly harvested marijuana and they had a basis for knowing that smell. . . .

Contrary to Johnson's assertion, the affidavit does not indicate the agents were unable to smell marijuana from other parts of the property but rather that the smell could not be detected from any location other than directly in front of Johnson's residence. But more importantly, the failure to explain away the absence of a smell in other locations would not be fatal to the affidavit absent some demonstration of a material omission of fact.

Finally, Johnson argues that exact distances from which the agents smelled the marijuana should have been included in the affidavit. This argument is unsupported by case law. An odor unconnected to any particular residence might be insufficient to establish probable cause standing alone. But other available information allows a magistrate to draw the reasonable inference that the odor was connected to the defendant's residence. And, moreover, the agents here did provide some idea of their location when they stated they smelled the odor in front of the home while in the street.

[Some citations omitted]

Result: Spokane County Superior Court conviction for possession of a controlled substance with intent to manufacture affirmed.

(6) **FISH STING SHOULD NOT HAVE BEEN DISMISSED ON "OUTRAGEOUS GOVERNMENT CONDUCT" GROUNDS** -- In State v. Rundquist, 79 Wn. App. 786 (Div. II, 1995), the Court of

Appeals for Division Two reverses a trial court dismissal. The trial court had dismissed, on outrageous conduct/due process grounds, a prosecution against Michael G. Rundquist for knowingly purchasing unlawfully taken: (A) salmon (six counts) and (B) steelhead (six counts).

Washington Wildlife Department agents set up a sting to sell unlawfully caught salmon and steelhead to Rundquist. Rundquist went for the deal and ultimately was charged criminally for his purchases. At trial, the judge ruled partway through the State's case that the government had acted outrageously in targeting Rundquist, so the judge dismissed the case on due process grounds.

In significant part, the Court of Appeals' explanation for its reversal of the trial court's action is as follows:

> We analyze the dismissal of this prosecution under CrR 8.3(b), which provides, "The court on its own motion in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution and shall set forth its reasons in a written order." . . .
>
> Washington courts have stated that a prosecution may violate the due process clause if government conduct is sufficiently outrageous: "Such conduct must be so outrageous that it violates the concept of fundamental fairness inherent in due process and shocks the sense of universal justice mandated by the due process clause." But no Washington decision has dismissed a prosecution for outrageous conduct by government agents. . . .
>
> Washington courts have repeatedly rejected the outrageous conduct defense in cases in which police were engaged in illegal activities. Our courts have declined to find outrageous conduct where police informants engaged in acts of prostitution and attempted to recruit new prostitutes, or engaged the services of a prostitute. Our courts have also declined to find outrageous conduct where the police themselves established an elaborate operation for the purchase and sale of stolen goods or set up a phony job recruiting center and solicited the purchase of marijuana from a potential job applicant.
>
> We agree with Justice Horowitz, who, after discussing the outrageous conduct cases, analyzed the doctrine as a matter of competing public polices. **[Horowitz analysis omitted by LED Ed.]** . . . Public policy is generally a matter for the legislature. The legislature has responded to concerns about improper police conduct by codifying the entrapment doctrine.
>
> Our inquiry under the outrageous conduct doctrine must focus on the issue of the defendant's rights, not on our evaluation of police conduct. As Justice Rehnquist observed in Russell [U.S. v. Russell, 411 U.S. 423 (1973)]:
>
> > The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. . . .

> Assuming without deciding that the due process clause incorporates some doctrine of outrageous conduct by governmental agents separate and apart from the entrapment defense, we hold that the doctrine must be sparingly applied and used only in the most egregious situations. Or as this court has observed previously, "this defense is a rarely used judicial weapon reserved only for the most unusual circumstances." This is not such a case. State and federal agents had reason to believe that there existed a substantial trade in illegally caught fish, which was sapping an already depleted natural resource important to our state and to the Indian tribes that have depended on this resource for centuries. Agent Hebner did not catch fish illegally. He simply acted as a conduit for the sale of fish already illegally caught. Defendant Rundquist has available to him the defense of entrapment, and he should have an opportunity to present that defense to the jury. The trial court abused its discretion in dismissing the charges on the ground of outrageous conduct.

[Citations and footnotes omitted]

Result: Pierce County Superior Court dismissal order reversed; case remanded for trial.

(7) **OFF-DUTY OFFICERS HAVE "PUBLIC SERVANT" STATUS UNDER FORMER "OBSTRUCTING" STATUTE --** In State v. Graham, __ Wn. App. __, 906 P.2d 992 (Div. I, 1995), the Court of Appeals for Division One upholds the juvenile court adjudications of Kevin Christopher Graham for resisting arrest and obstructing. The basis for the State's obstructing charge was that Graham had run from two off-duty police officers during a Terry stop. The officers were working for a private security firm, and had begun, at the time Graham ran, a lawful investigatory stop of Graham based on reasonable suspicion that he was in possession of illegal drugs. Then, after being seized again by the officers, Graham had resisted his arrest for obstructing.

The primary issue in the case is whether the two off-duty officers were acting in an official police capacity when Graham obstructed them. In pertinent and significant part, the Court's analysis is as follows:

> We first consider whether off-duty police officers working for a private security company are "public servants" discharging their "official powers and duties" for purposes of *former* [Italics by LED Editor -- see Editor's comment below regarding the current **"obstructing"** law.] RCW 9A.76.020(3) (1975), which made it a misdemeanor to "knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers and duties." . . .
>
> . . . In State v. Brown, 36 Wn. App. 166 (1983)**[May '84 LED:05]**, this Court determined that an off-duty police officer had the authority of an on-duty police officer to make warrantless arrests for misdemeanors committed in his presence pursuant to RCW 10.31.100. In Brown, the off-duty officer was at home when he saw a car prowl in progress. He identified himself to the prowler as a police officer and attempted to arrest the man. The court, in affirming the defendant's conviction for resisting arrest, noted that its conclusion furthered public safety and deterred criminal behavior. Washington courts have not, however, squarely addressed the question of whether privately employed off-duty police officers are "public servants"

discharging their "official powers and duties" pursuant to former RCW 9A.76.020(3).

Other jurisdictions with similar statutes protecting police officers have reached varying conclusions. **[Court of Appeals' extensive discussion re decisions in other jurisdictions omitted by LED Editor.]**

After examining pertinent case law, we find the following to be the relevant inquiry: Were the officers acting in their capacity as police officers in attempting to perform a law enforcement function or were they were performing acts of service solely for their employer? Here, by stopping Graham on a public street for carrying suspected narcotics, the uniformed, armed officers were not only serving their employer, but were also acting in their capacity as police officers attempting to enforce narcotics laws on a public street. The officers were therefore fulfilling dual responsibilities as police officers and as security guards. Moreover, Officer Hackett testified that the council paid them to patrol the area, not to make arrests and transport suspects to the precinct. Thus, they may have even acted partially in conflict with their employer's interest by arresting Graham in order to fulfill their duties as police officers. Rather than hindering public policy, this conclusion serves to protect officers and to prevent violence. Thus, in this instance, we hold that the off-duty police officers were public servants engaging in their official powers and duties for purposes of RCW 9A.76.020(3).

[Some citations omitted]

LED EDITOR'S COMMENT: The "obstructing" statute has been amended and subdivided into two statutes since Graham committed his crime, but we believe that the Graham decision will be a pro-state precedent under both of the current statutes. The two current statutes provide as follows:

RCW 9A.76.020 -- Obstructing

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

RCW 9A.76.020 Knowingly Making A False Material Statement

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement"

means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Graham's act of running from off-duty law enforcement officers would constitute "obstructing" of "law enforcement officers" under the current RCW 9A.76.020. See Graham and see State v. Hudson, 56 Wn. App. 490 (Div. I, 1990)April '90:16 (running from officer during Terry stop is "obstructing"). Also, while Graham's act of running away would not constitute a violation of RCW 9A.76.175 (because he made no false statement to the officers), if he had lied to the officers about his identity, or another material fact, then a violation of RCW 9A.76.175 would also be chargeable under the latter statute, because the off-duty officers would qualify as "public servants" under the ruling in Graham.

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U.S. SUPREME COURT GRANTS REVIEW ON PRETEXT, FORFEITURE ISSUES

In January 1996, the U.S. Supreme Court granted review in the following three cases, among others:

WHREN v. U.S. (No. 95-5841) Review of decision at 53 F.3d 571 (D.C. Cir. 1995).

Question presented: *Where pretextual traffic stop was undertaken by officers whose assignment to the narcotics squad did not include any responsibility for patrolling for traffic violations, was the stop objectively reasonable under Fourth Amendment when no reasonable narcotics officer in those circumstances would have made such stop other than for the pretextual reason (test used by Ninth, Tenth, and Eleventh Circuits), or was such stop permissible as long as it could have been made by any law enforcement officer because of traffic violation (test used by D.C. Circuit in this case, and Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits).*

U.S. v. $405,089.23 (No. 95-346) Review of decision at 33 F.3d 1210 (9th Cir. 1994)

Question presented: *Does Double Jeopardy Clause prohibit civil proceeding for in rem forfeiture of property alleged to be proceeds of narcotics and money laundering activities in case in which owners of property were also prosecuted for, and convicted of, narcotics and money laundering crimes?*

U.S. v. URSERY (No. 95-345) Review of decision at 59 F.3d 568 (6th Cir. 1995).

Question presented: *Does Double Jeopardy Clause prohibit defendant's criminal prosecution for manufacturing marijuana because government obtained consent judgment in civil action that sought forfeiture of defendant's property on ground that it facilitated illegal drug activities?* [Note: This case may or may not address the double jeopardy issue where a prior default, rather than consent, judgment of civil forfeiture is involved.]

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NEXT MONTH

The April 1996 LED will include, among other entries, a review of the decision in State v. Faford (Sup. Ct. No. 61898-4, issued February 1, 1996) In Faford, the Washington State Supreme Court

has ruled, 6-3, that a citizen's intentional and extensive use of a police scanner to monitor his marijuana-growing neighbors' cordless telephone conversations violated the Privacy Act at chapter 9.73 RCW.

The Faford Court has ruled that the citizen's use of the scanner was an "interception" under chapter 9.73, and that the conversations were "private," thus triggering the broad exclusionary provisions of chapter 9.73 RCW. Then, in an unprecedented exclusionary rule holding under chapter 9.73, the Court further holds that the police, who had not been involved in the prior illegal conduct in any way, had no legal authority to follow up the citizen's tip by going to the home of the suspects, confronting them, and obtaining an otherwise valid consent to search the grow operation house.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.